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Supreme Court, U.S.
FILED

98 1826 MAY 10 1999

OF THE CLERK

NO._____

IN THE SUPREME COURT
OF THE UNITED STATES
October 1998 Term

IN RE ALPHONSE GAINER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari from the U.S. Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

WILLIAM G. WARNER
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Panama City, Florida 32402
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ATTORNEY FOR PETITIONER

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Question Presented for Review

Whether the Eleventh Circuit Court of Appeals' establishment of a one-year period from the adoption of Sec. 105 of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, Stat. 1214 and 28 U.S.C. 2255 as a "reasonable time" for the filing of a motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. sec. 2255, in pre-AEDPA cases, improperly barred Petitioner's 2255 motion that was pending prior to the court's pronouncement of that limitations period?

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To: The Honorable Justices of the Said Court:

Petitioner, ALPHONSE GAINER, who is imprisoned, hereby files his Petition for Writ of Certiorari, pursuant to Rule 14, Supreme Court Rules, and requests this Court to grant his petition, and states:

Citations of the Official and Unofficial Reports

In the United States Court of Appeals for the Eleventh Circuit, Case No. 98-3479, Alphonse Gainer versus United States of America.

Basis for Jurisdiction

This petition arises from the Eleventh Circuit Court of Appeals' denial of a certificate of appealability under Sec. 105 of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, Stat.

1214 concerning petitioner's motion , pursuant to, 28 U.S.C. 2255. The Circuit Court of Appeals' Order is dated February 10, 1999. See, 28 U.S. C. sec. 1254, 2253(c)(1) and Hohn V. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

Statutes Involved in the Case

Sec. 105 of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, Stat. 1214 and 28 U.S.C. 2255.

Section 105 amended 28 U.S.C. sec. 2255, establishing a one-year "period of limitation" for motions filed pursuant to sec. 2255. The one-year period runs from the latest of four specified events:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion

created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court, and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Statement of the Case

The Petitioner was convicted in the United States District Court, Northern District of Florida, and on May 17, 1994, the trial court imposed a sentence of 540 months imprisonment. Petitioner subsequently appealed to the Eleventh Circuit Court of Appeals and the judgment and sentence was

affirmed. The mandate was issued on October 12, 1995.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132 Stat. 1214 became effective and amended 28 U.S.C. sec. 2255 by establishing a one-year deadline for the filing of motions to vacate, set aside or correct sentence.

On February 11, 1998, the Petitioner filed his motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. sec. 2255 in District Court and amended his motion on March 24, 1998. In an order dated October 2, 1998, the District Court adopted The Report and Recommendation of the U.S. Magistrate Judge that the motion be denied as untimely pursuant to the opinion of the Eleventh Circuit Court of Appeals, Goodman v. United

States, 151 F.3d 1335 (11th Cir., August 25, 1998). At the time of the Goodman decision, the Petitioner's motion had been pending in the District Court for some six months. The Petitioner sought a certificate of appealability from the District Court, but his application was denied. The Petitioner then filed a notice of appeal to the Eleventh Circuit Court of Appeals which treated the notice as a motion for certificate of appealabilty, and subsequently on February 10, 1999, entered its order denying the motion on the basis the petitioner had "failed to make a substantial showing of the denial of a constitutional right" 28 U.S.C. sec 2253(c)(2).

Basis for Federal Jurisdiction in the Court of First Instance

Petitioner filed a motion pursuant to 28 U.S.C. sec. 2255 in the U.S. District Court for the Northern District of Florida from his conviction, judgment and sentence in that court.

Argument

The Petitioner's pending pre-AEDPA motion to vacate, set aside or correct sentence was deemed untimely due to a decision that was improperly applied to bar his motion. The denial of the Petitioner's motion was based entirely on the timeliness issue and did not address the merits thereof. As applied to the Petitioner, the Goodman (supra) opinion unfairly gives with one hand and takes away with the other, since while it held that the AEDPA of 1996 did not apply retroactively

to time-bar a pre-act case, it established a deadline of April 23, 1997, as a "reasonable time" for defendants convicted and sentenced before the effective date of the act. Under the circumstances, the Petitioner did not and could not have had notice of the limitation period which was announced by the Court of Appeals six months after his motion had been filed with the District Court.

WHEREFORE, the Petitioner requests this Court to grant his Petition for Writ of Certiorari.

Respectfully Submitted,

WILLIAM G. WARNER
Florida Bar No. 346829
Post Office Box 70
Panama City, Florida 32402
(850) 769-1414
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari has been furnished by U. S. mail this 7th day of May, 1999, to: The Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

William G. Warner

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1. Order of Eleventh Circuit Court of Appeals dated February 10, 1999.

2. Order of United States District Court, Northern District of Florida dated October 20, 1998.

3. Application for Certificate of Appealability dated October 9, 1998.

4. Notice of Appeal dated October 9, 1998.

5. Order of United States District Court, Northern District of Florida dated October 2, 1998.

6. Report and Recommendation of the U.S. Magistrate Judge dated September 16, 1998.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 98-3479

ALPHONSE GAINER,
a.k.a. Phillip L. Black,
a.k.a. Daddy Black,

Petitioner-
Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee

Filed
U. S. Court of
Appeals Eleventh
Circuit
Feb. 10, 1999
Thomas K. Kahn
Clerk

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Appellant's motion to vacate, set aside, or correct sentence, 28 U.S.C. § 2255, was not timely filed within the one year statute of limitations period prescribed by § 2255. See Goodman v. United States, 151 F.3d 1335, 1337 (11th Cir. 1998). Accordingly, appellant's

notice of appeal, which has been construed as a motion for a certificate of appealability, see Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997), is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/S/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

vs.

Case No: 94-05004/LAC
5:98CV44/LAC/MD

ALPHONSE GAINER

_____/

ORDER

The defendant has an application for a certificate of appealability and paid the $105.00 appellate filing fee. Unless a certificate of appealability is issued, the defendant may not take an appeal from the final order denying Section 2255 relief. See 28 U.S.C. 2253(c)(1)(B).

Because the defendant has not made a substantial showing of the denial of a constitutional right, and for the reasons set forth in this court's October 2, 1998 order (doc. 64) adopting and incorporating the Magistrate Judge's Report and Recommendation

filed on September 16, 1998 (doc. 63) to which no objections were filed, a certificate of appealability is DENIED.

DONE AND ORDERED this 20th day of October, 1998.

/S/ LACEY A. COLLIER
LACEY A. COLLIER
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET 10/20/98 BY
DW [Rules 52 & 79(a) FRCP or 32(d)(1) & 55 FRCRP]
Copies mailed to: Jenkins, Warner, Sanders,& USCA

CERTIFIED A TRUE COPY
Robert A. Mossing Clerk
By: D WALKER
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 94-05004-LAC

ALPHONSE GAINER,

Defendant.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Defendant, ALPHONSE GAINER, JR., hereby makes application to the court for a certificate of appealability, and states:

1. Simultaneously herewith the Defendant files his Notice of Appeal of this court's order denying his motion to vacate, set aside, or correct sentence, entered in this action on October 2, 1998.

2. The order from which the Defendant appeals was based upon the September 16, 1998 Report and Recommendation of the U. S.

Magistrate Judge which recommended that the Defendant's motion be denied as untimely pursuant to the Eleventh Circuit Court of Appeal's opinion in Goodman v. United States, 151 F.3d 1335 (11th Cir., August 25, 1998).

3. As noted in the magistrate's report, the Defendant's motion to vacate, set aside, or correct sentence was filed on February 11, 1998 some six months before the date of the Eleventh Circuit's Goodman decision. As applied to this Defendant, the Goodman ruling unfairly gives with one hand and takes away with the other since it held that while the AEDPA of 1996 did not apply retroactively to time-bar a pre-act case, it established a deadline of April 23, 1997 for defendants convicted and sentenced before the effective date of the act. Therefore, the Defendant's pending pre-act motion to vacate, set aside or correct sentence was deemed

untimely due to a decision that applied retroactively to the Defendant's case.

4. The recommendation to deny the Defendant's motion was based entirely on the timeliness issue, and did not address the merits of the Defendant's motion which were, as noted by the magistrate:

1) That the court erred in its application of the sentencing guidelines because there was not sufficient proof at trial to sentence the Defendant according to the "crack" cocaine guidelines;

2) That the court did not respond to the jury's question, "[c]an there be a hung jury?";

3) That counsel was ineffective because she failed to request a mistrial, she did not obtain the Defendant's consent to the admission of the chemical analysis of the cocaine, and she did not conduct an adequate

cross examination of a government witness.

WHEREFORE, the Defendant requests this court to issue a certificate of appealability as to all issues mentioned above.

/S/ WILLIAM G. WARNER
WILLIAM G. WARNER
Florida Bar No. 346829
Post Office Box 70
Panama City, Florida 32402
(904)769-1414
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by U. S. mail this 9th day of October, 1998, to: Tony Jenkins, Assistant United States Attorney, 315 S. Calhoun Street, Tallahassee, Florida 32301.

/S/ WILLIAM G. WARNER
William G. Warner

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 94-05004-LAC

ALPHONSE GAINER,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Defendant, ALPHONSE GAINER, JR., hereby appeals to the United States Court of Appeals for the Eleventh Circuit form the order denying his motion to vacate, set aside, or correct sentence, entered in this action on October 2, 1998.

/S/ WILLIAM G. WARNER

WILLIAM G. WARNER
Florida Bar No. 346829
Post Office Box 70
Panama City, Florida 32402
(904)769-1414
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by U. S. mail this 9th day of October, 1998, to: Tony Jenkins, Assistant United States Attorney, 315 S. Calhoun Street, Tallahassee, Florida 32301.

/S/ WILLIAM G. WARNER
William G. Warner

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

vs. 94-05004/LAC
5:98CV44/LAC/MD

ALPHONSE GAINER,
_____/

ORDER

Upon consideration of the Recommendation of the Magistrate Judge filed on September 16, 1998 pursuant to 28 U.S.C. § 636(b) (1)(B), and after reviewing objections to the Recommendation, if any, the Recommendation is adopted as the opinion of the Court.

The defendant's motion to vacate, set aside, or correct sentence (doc. 57) is DENIED.

DONE AND ORDERED this 2nd day of Oct., 1998.

/S/ LACEY A. COLLIER
LACEY A. COLLIER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

vs. Case No: 94-05004/LAC
5:98cv44/LAC/MD

ALPHONSE GAINER,

_____/

REPORT AND RECOMMENDATION

This matter is before the court upon a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (doc. 57). The government has filed a response (doc. 60) and the movant has filed a reply (doc. 62). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After a careful review of the record it is the opinion of the undersigned that movant's motion is untimely and should not be considered by this court.

I. BACKGROUND

Following a jury trial, movant was convicted of possession with intent to distribute cocaine base, commonly known as "crack cocaine." He was sentenced to a term of 540 months imprisonment. The judgment from the Eleventh Circuit Court of Appeals affirming the movant's conviction and sentence was issued as mandate on October 12, 1995 (doc. 53).

In the instant motion, movant claims (1) the court erred in its application of the sentencing guidelines because there was not sufficient proof at trial to sentence movant according to the "crack" cocaine guidelines; (2) the court did not respond to the jury's question, "[c]an there be a hung jury?"; and (3)counsel was ineffective because she failed to request a mistrial, she did not obtain movant's consent to the admission of the chemical analysis of the cocaine, and she did not

conduct an adequate cross examination of a government witness (doc. 57).[1]

II. TIMELINESS OF THE MOTION

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132 Stat. 1214, became effective. The AEDPA amended Section 2255 of Title 28 by creating a one year period of limitation for filing motions to vacate, set aside or correct sentence. The one year limitation period runs from the later of:

> (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court

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[1]Movant's motion was submitted by his counsel, Mr. William Warner of Panama City, Florida.

> and made retroactively applicable to all cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (1996). These new provisions of the AEDPA which relate to post-conviction challenges apply to motions filed after the Act became effective. *Lindh v. Murphy*, 117 S. Ct. 2059, 2068, 138 L. Ed. 2d 481 (1997); *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 2336-37, 135 L. Ed. 2d 827 (1996).

Under a literal reading of the new Section 2255, movant had until January 12, 1997, to file his motion to vacate.[2] However, because new statutes of

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[2]The Honorable William Stafford, Senior Judge of this court, recently concluded that a conviction is "final" under the provision when it is no longer subject to examination on direct review, or in other words, when the defendent can no longer petition the Supreme Court for certiorari review. *United States v. Hall*, TCR 93-04073, 4:97cv274.

limitation generally must allow a "reasonable time for the commencement of suits upon existing causes of action," *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n. 21, 102 S. Ct. 781, 791 n. 21, 70 L. Ed. 2d 738 (1982) (citing *Wilson v. Iseminger*, 185 U.S. 55, 62, 22 S.Ct. 573, 575, 46 L.Ed. 804 (1902)), the circuits developed standards defining what a "reasonable time" is for the filing of post-conviction petitions after the enactment of the AEDPA by prisoners that were convicted and sentenced before the effective date of the AEDPA, had until April 23, 1997, to file a section 2255 motion. *Goodman v. United States*, - F.3d -, No. 97-4123, 1998 WL 537188 (11th Cir. Aug. 25, 1998).

In this case, movant was sentenced on May 17, 1994 (doc. 43), and the Court of Appeals issued its judgment affirming

movant's conviction and sentence as mandate on October 12, 1995. Movant filed his original motion to vacate on February 11, 1998 (doc. 54), and he filed his amended motion on March 24, 1998 (doc. 57). Clearly, movant's Section 2255 was filed outside the one year limitations period and movant has not alleged that there was an impediment to making a motion created by governmental action, that the Supreme Court recognized a new right that is to be applied retroactively to cases on collateral review, or that he could not have discovered the supporting facts through the exercise of due diligence.

Based on the foregoing, it is respectfully RECOMMENDED:

The motion to vacate, set aside, or correct sentence (doc. 57) be DISMISSED.

At Pensacola, Florida, this 16th day of September, 1998.

/S/ MILES DAVIS
MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon the magistrate judge and all other parties. Failure to object may limit the scope of appellate review of factual findings. See 28 U.S.C. § 636; Local Rule 27(B); *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).